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ALEXANDER L. STEVAS,
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NO. 82-110

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHESTER ORSINI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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July , 1982

QUESTIONS PRESENTED

1. Was the petitioner denied due process of law at his State criminal trial when the Court instructed the jury simply to choose between the comparative credibility of prosecution witnesses and defense witnesses?

2. Was the Petitioner denied due process of law by a persistent felony offender conviction based solely upon a prior conviction for violation of an anti-abortion statute which was unconstitutional under the holdings of this Court in Roe v. Wade, 410 U.S. 113 (1973), and Connecticut v. Menillo, 423 U.S. 9 (1975)?

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The petitioner, Chester Orsini, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on June 1, 1982.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 187 Conn. 264 (1982), and appears in the Appendix hereto. A motion to reargue was filed on June 4, 1982, and was denied on June 16, 1982. The motion and the order

are printed in the Appendix hereto. On June 16, 1982, the Connecticut Supreme Court, suo motu, amended its opinion, and the notification of such amendment from the reporter of Judicial Decisions also is printed in the Appendix hereto.

JURISDICTION

The opnion of the Supreme Court of the State of Connecticut was entered on June 1, 1982. A timely motion to reargue was denied on June 16, 1982, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES,

AMENDMENT XIV:

Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONNECTICUT GENERAL STATUTES,

SECTION 53a-48(a):

Sec. 53a-48(a). Conspiracy. Renunciation. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

SECTION 53a-122(a)(2):

Sec. 53a-122(a)(2). Larceny in the first degree: Class B felony. (a) A person is guilty of larceny in the first degree when: (2) the value of the property or service exceeds two thousand dollars.

SECTION 53a-123(a)(2):

Sec. 53a-123(a)(2). Larceny in the second degree: Class D felony. (a) A person is guilty of larceny in the second degree when: (2) the value of the property or service exceeds five hundred dollars.

SECTION 53a-40(b):

Sec. 53a-40(b). Persistent offender: Definitions; defense; authorized sentences. (b) A persistent felony offender is a

person who (1) stands convicted of a felony; and (2) has been, prior to the commission of the present felony, convicted of and imprisoned under an imposed term of more than one year or of death, in this state or in any other state or in a federal correctional institution, for a crime. This subsection shall not apply where the present conviction is for a crime enumerated in subdivision (1) of subsection (a) and the prior conviction was for a crime other than those enumerated in subsection (a).

SECTION 53a-40(f):

Sec. 53a-40(f). When any person has been found to be a persistent felony offender, and the court is of the opinion that his history and character and the nature and circumstances of his criminal conduct indicate that extended incarceration will best serve the public interest, the court in lieu of imposing the sentence of imprisonment authorized by section 53a-35 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by said section for the next more serious degree of felony.

SECTION 53-29:

Sec. 53-29. ATTEMPT TO PROCURE MISCARRIAGE. Any person who gives or administers to any woman, or advises or causes her to take or use anything, or uses any means, with intent to procure upon her a miscarriage or abortion, unless the same is necessary to preserve her life or that of her unborn child, shall be fined not more than one thousand dollars or imprisoned in the State Prison not more than five years or both.

STATEMENT OF THE CASE

Chester Orsini, the Petitioner herein, was convicted in the Connecticut Superior Court at Middletown, on May 19, 1976, of one count of larceny in the first degree, one count of conspiracy to commit larceny in the second degree, and persistent felony offender. Upon a direct appeal, his conviction was affirmed by the Connecticut Supreme Court on June 1, 1982.

Two prosecution witnesses testified at trial that on three separate occasions in late 1974 or early 1975 they burglarized a private residence in the Town of Westbrook, Connecticut, and on all three occa-

sions stole quantities of antique firearms. One of the two witnesses testified that he sold of the weapons to Mr. Orsini, advising Mr. Orsini of their illegal source. Defense witnesses testified, on the contrary, that Mr. Orsini had purchased the firearms in a good-faith business transaction without any knowledge that they had been stolen.

Over a timely objection, the trial court instructed the jury in relevant part as follows: "Now, that sort of pretty much sums up the specific crimes, and in a moment I will be through. In other words, you will have to decide, on the basis of all the evidence presented before you, whether the State has proved, beyond a reasonable doubt, all of the elements of the crimes with which the accused is charged, as I have explained those elements to you. You will have to decide whether you believe the State's witnesses as to the commission of these crimes, and the participation of the accused, or whether you believe the testimony of the defendant's witnesses as to the defendant's innocence. In essence, it is as simple as that." (Jury Charge, Tr. p. 626)

After Mr. Orsini was convicted on the larceny and conspiracy counts, he was tried to the court on a charge of being a persistent felony offender. He was found guilty upon the basis of a 1965 Connecticut conviction for the crime of aiding and abetting the commission of an abortion in violation of §53-29 of the Connecticut General Statutes.

Affirming Mr. Orsini's conviction in this case, the Connecticut Supreme Court disapproved the quoted portion of the jury charge, but held that in the context of the entire charge to the jury the improper portion was not sufficiently prejudicial to warrant reversal. 187 Conn. at 276-77. With respect to the persistent felony offender conviction, the Connecticut Supreme Court held that the defendant on appeal had the burden of proving that his abortion conviction was obtained in violation of Roe v. Wade, 410 U.S. 113 (1973), as applied to the Connecticut law in Connecticut v. Menillo, 423 U.S. 9 (1975). The Court held that the record was ambiguous on the question of whether the person performing the abortion had been a layman

or a physician, and accordingly rules that the underlying conviction was not unconstitutional. 187 Conn. at 277-80.

REASONS FOR GRANTING THE WRIT

I

The Petitioner Was Denied Due Process of Law At His State Criminal Trial When the Court Instructed the Jury Simply to Choose Between the Comparative Credibility of Prosecution Witnesses and Defense Witnesses.

Comparative credibility instructions of the type utilized in this case had been widely condemned as violating the presumption of innocence and thus denying due process of law. E.g., United States v. Guest, 514 F.2d 777 (1st Cir. 1975); United States v. Brown, 582 F.2d 197, 201-02 (2d Cir.), cert. denied, 439 U.S. 915 (1978); United States v. Pine, 609 F.2d 106, 108 (3d Cir. 1979). As the Connecticut Supreme Court pointed out in its opinion in this case, "the flaw in such a charge is that it invites the jury to treat the matter of proof as a 'fair fight' between the prosecution and the defense

rather than as one weighted in favor of the latter by the necessity of proving guilty beyond a reasonable doubt." 187 Conn at 276. Citing United States v. Oquendo, 490 F.2d 161, 166 (5th Cir. 1974) (Gee, J., concurring).

In this particular case, there was a great likelihood of prejudice from the instruction given. The petitioner did not testify on his own behalf. The witnesses he called testified that he had, indeed, been in possession of the stolen items but claimed his possession was honest and in good faith. He relied on cross-examination of prosecution witnesses to establish his claim that he had not been involved in any way, before or after the fact, in the burglaries in question. By telling the jury that guilt or innocence should be determined upon the basis of the comparative credibility of witnesses, the Court emphasized the petitioner's failure to testify on his own behalf, implicitly calling for an adverse inference from his silence. See, e.g., United States v. Alfonso-Perez, 535 F.2d 1362 (2d Cir. 1976). On the facts of this particular

case, even viewed in the context of the entire charge, the "comparative credibility" charge given by the Court denied due process of law to the petitioner.

Because of the particular prejudice demonstrated in this case, it presents a compelling set of facts for review by this court of the "comparative credibility" jury instruction which has provoked so much adverse commentary from the lower courts.

II

The Petitioner Was Denied Due Process of Law By a Persistent Felony Offender Conviction Based Solely Upon a Prior Conviction for Violation of an Anti-Abortion Statute Which Was Unconstitutional Under the Holdings of This Court in Roe v. Wade, 410 U.S. 113 (1973), and Connecticut v. Menillo, 423 U.S. 9 (1975).

In 1965, Mr. Orsini was convicted in the Connecticut Superior Court at New Haven of aiding and abetting the commission of an abortion. That conviction was subsequently affirmed on appeal, State v. Orsini, 155 Conn. 367, 232 A.2d 907 (1967), and federal habeas corpus relief was denied, United States ex rel. Orsini v.

Reincke, 286 F.Supp. 974 (D.Conn.), aff'd 397 F.2d 977 (2d Cir. 1968). In the present case, he was charged and convicted as a persistent felony offender upon the basis only of that 1965 conviction.

In 1973, the Connecticut Abortion Statute was declared unconstitutional by the United States District Court. Abele v. Markle, 369 F.Supp. 807 (D.Conn. 1973). The ultimate authority for the declaration of unconstitutionality was, of course, this Court's ruling in Roe v. Wade, 410 U.S. 113 (1973). See generally Lady Jane v. Maher, 420 F.Supp. 318 (D.Conn.), aff'd sub nom. Maloney v. Lady Jane, 431 U.S. 926 (1976). Prior to this Court's affirmance of Lady Jane, it qualified its interpretation of the Connecticut Abortion Statute in Connecticut v. Menillo, 423 U.S. 9 (1975), holding that the statute was not unconstitutional when applied to performance of an abortion by a non-physician. In the present case, the Connecticut Supreme Court relied on Connecticut v. Menillo to affirm Mr. Orsini's persistent felony offender conviction. In doing so,

the Connecticut Supreme Court ignored the facts of its own cases and, more importantly for present purposes, misconstrued this Court's holdings in Roe, Menillo, and Lady Jane.

The Connecticut Supreme Court agreed with the petitioner "that a conviction which has been procured in violation of constitutional rights cannot be used to increase the punishment which would ordinarily be permissible." Citing Baldasar v. Illinois, 446 U.S. 222 (1980); United States v. Tucker, 404 U.S. 443 (1972); Burgett v. Texas, 389 U.S. 109 (1967); Lewis v. United States, 445 U.S. 55 (1980). The Court consulted its prior opinion in State v. Orsini, 155 Conn. 367, supra, and attempted to find a basis for suggesting that the person aided and abetted by Mr. Orsini in that case was not a physician. In its original opinion in this case, the Connecticut Supreme Court claimed that the abortion in question "was performed by the defendant's brother in a motel room...." That opinion was subsequently amended to strike the claim that Mr. Orsini's brother had been involved, when it was pointed out to the Supreme Court that its own previous

decision had expressly stated that the abortion was performed by an individual from Trenton, New Jersey, known in the State of New Jersey as "Dr. Walker". In fact, as is made clear in the original Orsini opinion at 155 Conn., there is no indication one way or the other respecting the physician status of the individual Orsini had assisted although there are some indications that the individual was considered to be a physician.

What the Connecticut Supreme Court ignored, however, was that Mr. Orsini was not charged with or convicted of aiding in the performance of an abortion by a non-physician. Evidence was not presented at his trial to show that the individual performing the abortion was not a physician and there is no such allegation in the pleadings. Accordingly, he was convicted of a charge which was invalid on its face and invalid under the evidence as presented.

As the Connecticut Supreme Court itself noted, the silence of the record with respect to a constitutional question raised by an underlying conviction in a persistent

felony offender prosecution is sufficient to invalidate a persistent felony offender conviction. Citing Burgett v. Texas, supra, at 114-15. State v. Orsini, 187 Conn. at 279. The Connecticut Supreme Court ignored its own observation respecting the prior holdings of this Court, and ruled that since there was no evidence on the record of the underlying conviction to indicate whether it was obtained under constitutionally permissible or constitutionally impermissible circumstances, the Court would presume that the facially invalid statute was applied in a lawful manner. Such a presumption is utterly unwarranted and is not authorized by any applicable case law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted,

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DATED: June , 1982